



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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OCT 7 2010

RE: MUR 6256
Michael Babich

Dear Ms. Fishburn:

On March 2, 2010, the Federal Election Commission notified your client, Michael Babich, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On October 5, 2010, the Commission found on the basis of the information in the complaint, information provided by your client, and publicly available information, that there is no reason to believe Mr. Babich violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a) in connection with his filing of a Statement of Candidacy; 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a) in connection with a disclaimer on a website, and 11 C.F.R. §§ 102.5(a)(2) and 102.15 in connection with a solicitation that appeared on the website. In the exercise of its prosecutorial discretion, the Commission also dismissed the allegation that Mr. Babich violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a) in connection with a disclaimer on a flyer. Accordingly, on October 5, 2010, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Roy Q. Luckett
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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6 **RESPONDENT: Michael Babich**

MUR: 6256

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8 **I. INTRODUCTION**

9 The complaint alleges that Michael Babich ("Babich" or "Respondent") knowingly and
10 willfully failed to file a Statement of Candidacy and designate a principal campaign committee in
11 connection with his bid to seek the Republican nomination in California's 4th Congressional
12 District despite conducting activities that indicated he was a candidate. It also alleges that Babich
13 knowingly and willfully failed to include disclaimers on an asserted campaign website and on
14 printed campaign materials he apparently distributed; violated Commission regulations by
15 soliciting funds on the website for a "study committee" without advising potential donors that the
16 funds were to be used in a federal election and were subject to the limits and prohibitions of the
17 Federal Election Campaign Act of 1971, as amended (the "Act"); and impermissibly commingled
18 campaign receipts with those of the "study committee."¹

19 As discussed below, the Commission has determined to: (1) find no reason to believe that
20 Michael Babich violated 2 U.S.C. § 432(e) and 11 C.F.R. § 101.1(a) by failing to file a timely
21 Statement of Candidacy prior to its filing on March 13, 2010, because he does not appear to have
22 become a candidate until March 5, 2010, at the earliest; (2) find no reason to believe that Michael
23 Babich violated 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a) by failing to include a disclaimer on
24 the website prior to becoming a candidate because a non-political committee website does not

¹ The complaint also alleges that Babich violated 11 C.F.R. §§ 102.7(a), (b) and (c) by failing to designate a treasurer and accepting contributions and making expenditures in the absence of a treasurer, and 11 C.F.R. §§ 103.1, 103.2, and 103.3 by failing to designate a campaign depository, to notify the Commission of it, and to deposit all political committee receipts into it. These regulations place the specified obligations on a political committee and/or treasurer, however, and not a candidate and are premised on Babich's having been a candidate prior to the complaint. The Commission concludes that he was not a candidate at that time. Accordingly, the Commission made no findings as to the Committee and these alleged violations.

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1 constitute a "public communication" under 11 C.F.R. § 100.26; (3) exercise its prosecutorial
2 discretion and dismiss the allegation that Michael Babich violated 2 U.S.C. § 441(d)(a) and
3 11 C.F.R. § 110.11(a) with respect to a flyer he personally distributed in light of its apparent
4 limited distribution and low cost; and (4) find no reason to believe that Michael Babich violated
5 11 C.F.R. §§ 102.5 and 102.15 in connection with solicitations made on the website before he
6 became a candidate because the solicitation expressly requested funds for a non-campaign entity,
7 Paypal deposited the minimal funds received in response to it into an account of that entity that
8 was not controlled by Babich, and the funds were not used in connection with Babich's federal
9 election.

10 **II. FACTUAL AND LEGAL ANALYSIS**

11 12 **A. Factual Background**

13
14 According to the complaint, Babich engaged in several activities between December 2009
15 and February 2010 that caused him to become a "candidate" pursuant to the Act. These activities
16 included: registering and launching a website, babichforcongress.org, on or about December 22,
17 2009; conducting a signature-gathering campaign in late January 2010 to secure sufficient
18 signatures to qualify for the state ballot; and personally distributing campaign materials on or
19 about February 8, 2010.² Complaint at 2-3. The complaint included two screen shots of the
20 website and a copy of the campaign materials, a one-page flyer, Babich allegedly personally
21 distributed. Complaint Exhibits A, B and D.

22 Both the website and the campaign materials referred to Babich as a candidate for
23 Congress and expressly advocated his candidacy. A screenshot of the website home page

² The complaint states that Babich was witnessed distributing the flyer on February 8, 2009. The Commission believes this is a typographical error and should read "2010" because the flyer referenced the website, www.BabichforCongress.org, which was not registered until December 22, 2009. InterNic: Public Information Regarding Internet Domain Name Registration Services at <http://www.internic.net/whois.html>.

1 prominently featured a banner stating, "Michael Babich for Congress" next to his photo, referred
2 to him as "a new and innovative candidate, California's 4th Congressional District," and urged
3 "[l]et's send someone to Congress with the real world experience that will defend our liberties!"
4 Complaint Ex. A. Similarly, the campaign materials the complaint alleges Babich personally
5 distributed consisted of a one-page color flyer printed on plain paper with the same Babich photo
6 as on the website and language similar to that on the website. Complaint Ex. D. The flyer began
7 with the phrase: "Colonel Mike Babich, USAR (Ret.) for U.S. Congress," referred to him as
8 "[y]our local CA-4th District candidate," exhorted recipients to "[s]end someone to Congress with
9 real world experience to defend our Liberties!," and urged recipients to "[v]isit
10 www.BabichforCongress.org" to learn about his ideas. *Id.* Neither the Babich website nor the
11 flyer contained disclaimers identifying who paid for them.

12 At the time the complaint was filed, the babichforcongress.com website also included a
13 "Contribute" page with buttons on which an internet user could click to make donations in various
14 amounts. Complaint Ex. B. The solicitation on the page stated: "The unfortunate fact is that
15 funds are necessary to 'get the word out.' Any and all contributions are appreciated. At present,
16 funds go towards a study committee for political instauration³ of the Sierra Nevada region." The
17 page also offered donors an option to mail checks payable to "Study Committee for Sierra Nevada
18 Leadership" in care of Babich. The "Contribute" page contained the same "Michael Babich for
19 Congress" banner and photo as the home page.

³ The website and flyer define "instauration" as "the act of restoring; repairing; renewal after decay, lapse or dilapidation."

1 Babich filed a Statement of Candidacy designating "Citizens to Elect Mike Babich for
2 Congress" ("the Committee") on March 13, 2010,⁴ eleven days after the complaint notification
3 letter was mailed. The Committee filed a Statement of Organization on the same day and its 2010
4 April Quarterly Report on April 15, 2010.

5 **B. Statement of Candidacy**

6 Within fifteen days after becoming a candidate under 2 U.S.C. § 431(2), a candidate shall
7 designate his or her principal campaign committee by filing a Statement of Candidacy. *See*
8 2 U.S.C. § 432(e); 11 C.F.R. § 101.1(a).

9 An individual becomes a "candidate" for federal office when he or she has received
10 contributions or made expenditures aggregating in excess of \$5,000. 2 U.S.C. § 431(2). The
11 Commission's "testing the waters" regulations create exemptions to the definitions of
12 "contribution" and "expenditure" that permit an individual to receive or spend funds to determine
13 the feasibility of becoming a candidate. *See* 11 C.F.R. §§ 100.72(a); 100.131(a). Certain
14 activities, however, may indicate that an individual has decided to become a candidate and, if the
15 individual has received or expended funds in excess of \$5,000, require the individual to file a
16 Statement of Candidacy with the Commission. These activities include two described in the
17 complaint: making or authorizing written or oral statements that refer to him or her as a candidate
18 for a particular office (11 C.F.R. § 100.72(b)(3); 11 C.F.R. § 100.131(b)(3)), and taking action to

⁴ The response and affidavit state that the Statements of Candidacy and Organization were filed on March 15, 2010. However, FEC indices indicate they were filed on March 13, 2010, based on the postmark and the method of delivery, Express Mail. *See* 11 C.F.R. § 104.5(e).

1 qualify for the ballot under state law (11 C.F.R. §§ 100.72(b)(5) and 100.131(b)(5)).⁵

2 The complaint essentially alleges that Babich had become a candidate on or before
3 February 8, 2010, because he had referred to himself as a candidate on his website and in a flyer ...
4 that he personally distributed and took action to qualify for the state ballot before that time. It
5 contains no allegations as to whether the expenditures related to these activities exceeded the
6 \$5,000 candidate threshold. The complaint also lacks any factual or legal basis for its allegations
7 that Babich knowingly and willfully failed to file a Statement of Candidacy.

8 Respondent, a first-time candidate for public office, maintains that he timely filed a
9 Statement of Candidacy because he did not become a candidate until at least March 5, 2010, when
10 he opened a Committee bank account, although he also states that he had not yet received
11 contributions or made expenditures in excess of \$5,000 as of that date. Response at 1. With
12 respect to contributions, Babich specifically states in an affidavit accompanying the response that
13 he did not solicit or receive any funds in support of his candidacy until March 5, 2010. Babich
14 Affidavit (Aff.) ¶ 2. He attests that funds solicited through the website prior to that date were for a
15 Section 501(c)(4) organization that he helped create, the Study Committee for Sierra Nevada
16 Leadership ("Study Committee"), that only \$700 was received through that mechanism and was
17 deposited directly into a Study Committee bank account controlled by the organization's treasurer,
18 and that these funds were not used to support his candidacy. Babich Aff. ¶6. Babich further avers

⁵ The response states that the "testing the waters" rules do not apply under the circumstances and that Babich never claimed he was "testing the waters." Response at 2. Yet, it also states that during the relevant period, "[h]e was discussing his candidacy as a potential candidacy with voters and potential supporters to assist him in making the final decision to run for office" (Response at 1-2), and he expended some funds, albeit minimal, in pursuit of his potential candidacy. See Babich Affidavit attached to the Response at ¶5 (acknowledges spending about \$450 for a website registration fee and related website expenses and for information cards concerning his potential candidacy). Discussing a potential candidacy to assist in the decision whether to run for office, coupled with making expenditures toward a potential run for federal office, appears to place Babich's activities within the "testing the waters" category. See 11 C.F.R. §§ 100.72; 100.131 (the "testing the waters" exemption applies to funds received or payments made to "determine whether an individual should become a candidate.").

1 that all references to the Study Committee were removed from the website when he opened the
2 Committee account, and that the Committee then opened a new Paypal account for the website.
3 Babich Aff. ¶ 6. A review of the website as it appeared after the complaint was filed confirmed
4 that references to the Study Committee were removed.

5 The Committee's 2010 April Quarterly Report ("the Report") appears to corroborate
6 Babich's statement that he had not received more than \$5,000 in contributions before March 5,
7 2010. The Report reflects that the Committee received \$10,212 in receipts between March 5 and
8 March 31, 2010, consisting of \$3,462.67 in contributions from individuals and \$6,750 in personal
9 funds from Babich comprised of a \$1,750 contribution and a \$5,000 loan. The Committee
10 received all but \$200 of the contributions from individuals after March 16, 2010. It disclosed no
11 receipt dates for Babich's personal funds, but disclosed that \$5,634.86 of these funds was
12 disbursed on March 12, 2010, to pay the required candidate filing fee and for a Statement of
13 Qualifications for a voter information pamphlet.⁶ See Schedule B of the Report and Babich Aff.
14 ¶¶ 2 and 5. Babich's sworn statement that he opened the Committee account on March 5, 2010,
15 and the March 12, 2010, disbursement dates indicate the Committee received the funds sometime
16 during the period of March 5-12, 2010. Thus, it appears that Babich did not receive contributions
17 in excess of \$5,000 before March 5, 2010.

18 As for expenditures made before March 5, 2010, Babich's affidavit acknowledges that he
19 spent about \$450 for a website registration fee and related expenses and for "information cards"
20 concerning his "potential candidacy." Babich Aff. ¶ 5. The Committee's 2010 April Quarterly
21 Report does not reflect these disbursements. Neither the affidavit nor the Report address the cost

⁶ The reference to a Statement of Qualifications appears to be a reference to the purchase of space on a portion of a county sample ballot. California law permits U.S. House of Representative candidates to purchase space for a candidate statement on the voter information portion of the county sample ballot. See http://www.sos.ca.gov/elections/elections_cand_stat.htm.

1 of the campaign flyer except possibly a disclosure in the Report of a \$100 debt owed to Jerry
2 Southworth/JDS Photo. The only reported disbursements are for the previously mentioned state
3 filing fee and Statement of Qualifications.⁷ However, the flyer attached to the complaint appears
4 to be a communication produced relatively inexpensively using a computer and color copier. It
5 consists of varying size text accompanied by a photo of Babich over a background photo and flag
6 image apparently photocopied on plain paper using a color printer. No information is provided in
7 the complaint or the response as to how many copies of the flyer were created or distributed. The
8 only information as to the flyer's distribution is the complainant's assertion that someone
9 witnessed Babich personally distributing it, suggesting a limited distribution.

10 Given the apparent low costs associated with the creation of the flyer, its apparent limited
11 distribution and the minimal expenses attested to by Babich in his affidavit, it appears unlikely
12 that Babich exceeded the \$5,000 expenditure threshold for candidacy before March 5, 2010, the
13 earliest date on which he could have become a candidate. Since he filed his Statement of
14 Candidacy within 15 days of that date, the Commission has determined to find no reason to
15 believe that Michael Babich violated 2 U.S.C. § 432(e) and 11 C.F.R. § 101.1(a).

16 C. Disclaimers

17 The complaint also alleges that Babich knowingly and willfully failed to include
18 disclaimers on his website and on the flyer. Complaint at 4. Both the website and flyer expressly
19 advocated Babich's election to Congress. Both communications opened with Babich's name,
20 followed by the phrase "for US Congress," and included similar exhortations to "[s]end someone

⁷ In light of the apparently minimal amounts involved and our decision to find no reason to believe or to dismiss the violations specifically alleged by the Complainant, the Commission has made no finding as to Babich's apparent failure to report the disbursements for the website, information cards and flyers in the 2010 April Quarterly Report. See 11 C.F.R. § 100.131(a) (requiring payments made during the "testing the waters" period to be reported once an individual becomes a candidate).

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1 to Congress with real world experience to defend our [l]iberties.” The response does not address
2 the disclaimer allegations.

3 The Act and Commission regulations require that that all public communications paid for
4 by a candidate or a political committee, and all Internet websites of a political committee, must
5 contain a disclaimer clearly stating that the political committee has paid for it. 2 U.S.C.
6 § 441d(a) and 11 C.F.R. §§ 110.11(a)(1) and (b)(1). A public communication that is paid for by
7 any person that expressly advocates the election or defeat of a clearly identified candidate must
8 clearly state it has been paid for by that person and also whether or not it has been authorized by
9 the candidate or the candidate’s authorized committee. 2 U.S.C. § 441d(a) and 11 C.F.R.
10 §§ 110.11(a)(2), (b)(2) and (b)(3). A “public communication” is a communication by means of
11 any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising
12 facility, mass mailing or telephone bank to the general public or any other form of general public
13 political advertising. 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. Communications over the Internet,
14 except for communications placed for a fee on another person’s website, are not “general public
15 political advertising,” and hence, are not “public communications.” 11 C.F.R. § 100.26.

16 Babich acknowledges in his affidavit that he paid for the website. Babich Aff. ¶ 5. Babich
17 was not a “candidate” before March 5, 2010, however, so the website prior to that time was not the
18 Internet website of a candidate or political committee requiring a disclaimer pursuant to 11 C.F.R.
19 § 110.11(a)(1). In addition, because the website was not an Internet communication placed for a
20 fee on another person’s website pursuant to 11 C.F.R. § 100.26, it did not constitute a “public
21 communication” by any person under 11 C.F.R. § 110.11(a)(2) even though it expressly advocated
22 Babich’s election. Thus, no disclaimer was required on it.⁸ Accordingly, the Commission has

⁸ The Committee placed a disclaimer on the website after Babich became a candidate.

determined to find no reason to believe that Michael Babich violated 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a) in connection with the website.

Similarly, the flyer was created, and according to the complaint, distributed, prior to Babich's candidacy, so it was not a communication made by a candidate or political committee. Therefore, no disclaimer was required pursuant to 11 C.F.R. § 110.11(a)(1). However, because the flyer expressly advocated Babich's election, a disclaimer may have been required to the extent the flyer constituted a "public communication" made by any person under 11 C.F.R. § 110.11(a)(2).

The Commission need not resolve the issue of whether it was a public communication. Assuming the complaint's assertion about the distribution is accurate, Babich appears to have personally distributed the material on a limited basis, he may have effectively identified himself as the author because he is pictured in it, and the production costs were likely *de minimis*. Under these circumstances, the Commission has determined to exercise its prosecutorial discretion and dismiss the allegation that Michael Babich violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11(a) by failing to include a disclaimer on the handbill/flyer. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

D. Solicitation of Contributions on Pre-Candidacy Website

The complaint's final two allegations, that Babich violated 11 C.F.R. §§ 102.5(a)(2) and 102.15, are premised on the presumption that the pre-March 5, 2010, version of the website was a political committee website and that the "Contribution" page solicited contributions for Babich's election. Section 102.5(a) applies to political committees that finance both federal and nonfederal elections and its purpose is to ensure that only funds subject to the Act's limitations, prohibitions and reporting requirements are used in federal elections. The purpose of Section 102.5(a)(2) is to ensure that contributors who contribute to political

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1 committees that finance both federal and nonfederal elections know the intended use of their
2 contributions. *See* Explanation and Justification for *Prohibited and Excessive Contributions: Non-*
3 *Federal Funds or Soft Money*, 67 Fed. Reg. 49064, 49073 (July 29, 2002). To that end, it requires
4 that a contribution deposited into a federal account meet at least one of three conditions, including
5 two that the complaint alleges Babich violated: (1) the contribution must result from a solicitation
6 expressly stating that it will be used in connection with a federal election, or (2) the contributor
7 must be informed that the contribution is subject to the Act's limitations and prohibitions. Section
8 102.15 prohibits political committee funds from being commingled with the personal funds of
9 committee officers, members or associates or those of any other individual.

10 As discussed, *supra*, Babich had not yet attained candidate status prior to March 5, 2010,
11 so the website prior to that time was not that of a political committee. The funds solicited on the
12 "Contribute" page, though appearing in the context of a website that bore the hallmarks of a
13 campaign website, expressly requested that donations be made payable to the Study Committee.
14 Babich attested that Paypal deposited the small amount of funds received as a result of the website
15 solicitation directly into the Study Committee's bank account, which its treasurer controlled, and
16 none of the funds "have been used or will be used to support" his candidacy. Babich Aff. ¶6.
17 There is no information to the contrary. Additionally, since the funds solicited did not constitute
18 contributions received by a political committee and were not placed into a candidate's or a
19 political committee's bank account but instead were deposited into the Study Committee's
20 account, the funds were not commingled. Therefore, the Commission has determined to find no
21 reason to believe that Michael Babich violated 11 C.F.R. §§ 102.5 and 102.15.

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